No. 3956

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CHARLES E. WARREN and MABEL D. WARREN,
Plaintiffs in Error,

vs.

F. GENN BROMLEY,
Defendant in Error.

OPENING BRIEF FOR PLAINTIFFS IN ERROR.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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This action was brought by the defendant in error (hereinafter called the plaintiff) against the plaintiffs in error (hereinafter called defendants), to recover damages for the alleged breach of a contract for the sale and purchase of real and personal property. The case was tried before the District Court of the United States, for the Southern Division of the Northern District of California, without a jury, and judgment was rendered in favor of defendant in error for the total sum of $9000.

ALLEGATIONS OF COMPLAINT.

The complaint in this action alleges that on December 1, 1919, plaintiff and defendant entered into

an agreement for the purchase and sale of certain real and personal property; that upon execution of the agreement plaintiff paid $6000 on account of the purchase price, and agreed to pay the balance of $45,000 on or before five years from that date, with interest at the rate of six per cent per annum, payable annually; that plaintiff entered into immediate possession of the property and continued thereafter during 1920 to farm the land; *that on or about September 30, 1920, plaintiff placed the property in the temporary care of a competent foreman and went to San Francisco;* that during his absence and about December 1, 1920, *defendants wrongfully and unlawfully and without the knowledge or consent of the plaintiff, entered upon said premises,* and claimed that plaintiff had broken his contract and that they were entitled to resume possession of the property, and that plaintiff had forfeited all his right to moneys paid thereon; *that plaintiff has duly and fully performed all the terms and conditions of said contract on his part to be performed;* that defendants by their breach of the contract have damaged plaintiff in the sum of $12,025, which damages are: $6000 paid on the purchase price; $3625 alleged to have been expended for labor and the value of his own labor; $2500 alleged to be the enhanced value of the property resulting from the alleged labor and care bestowed on it by him; such other sums as the court may see fit to allow him on

account of the alleged breach by defendants; $2216.38 for conversion of certain personal property which he claims he left on the ranch.

DENIALS AND ALLEGATIONS OF ANSWER.

The answer of defendants denies that on or about December 1, 1920, during plaintiff's absence, *defendants wrongfully or unlawfully or without the knowledge or consent of plaintiff, entered upon said premises;* but admit that on December 8, 1920, defendants entered and took possession of said real property for the reason that plaintiff had breached his contract, as alleged in the answer, and that all of his rights thereunder had terminated;

Deny that defendants have violated or broken their contract;

Deny that plaintiff has duly or fully or at all performed the conditions of the contract on his part to be performed;

Allege and specify many breaches of the contract upon the part of plaintiff, and allege that because of his breaches all of his rights under the contract terminated and all payments made by him should be treated as compensation for the rental and occupancy of the land up to December 8, 1920;

Deny that any act of defendants have caused *any loss or damage to plaintiff of any sum at all.*

CONDITIONS OF CONTRACT BETWEEN PLAINTIFF AND DEFENDANTS.

In the fall of 1919, plaintiff applied to defendants for the purchase of the property which is the subject of this action. This property consists of fifty-five acres of fruit-bearing orchard, on which is situated a large dwelling house and other buildings, and many farming implements and machinery, and was valued at more than fifty thousand dollars.

On December 1, 1919, an agreement was entered into between the parties for the sale and purchase of the property. Under the terms of this agreement it was provided that the purchase price of the property should be $51,000. At the time of the execution of the agreement plaintiff paid to defendants only $6000 on account of the purchase price, and agreed to pay the remaining $45,000 thereof within five years from that date, with interest thereon at the rate of six per cent per annum, *payable annually.* It was further provided that if the interest was not paid when due, it should be added to the principal and become a part thereof, and thereafter bear interest at the same rate.

Under this agreement plaintiff agreed *to farm the premises in a first-class farmerlike and orchardistlike manner; to prune the trees at the proper time each year,* and as far as possible *to remove all borers* from the roots thereof; *to remove all dead trees* and as soon as customary thereafter *to replant the same with apricot or prune* trees; *to irrigate the orchard* each year when water was available; *to eradicate*

all rodents and other pests so far as reasonably possible; *to spray the pear trees* each year as often as it is customary to do so.

It was agreed by the parties that the title to 60% of the crop grown each year on the orchard should remain in the defendants until it was sold and the proceeds disposed of in the manner provided for in the contract, and that sale should be made in the joint names of the parties in the proportion of 60% in the name of defendants, and 40% in the name of plaintiff, and that the portion which should go to defendants should be *credited* by them on *unpaid interest* and the balance on the principal.

It was further agreed that defendants might, at any time, enter upon the premises and inspect them.

That *plaintiff should pay all taxes and assessments* which might be assessed against the property until the payment of the full purchase price, and in the event of his failure to pay any of the assessments *when due,* the defendants

> "retain the privilege of paying the same and upon doing so, said amount or amounts so paid shall thereupon become a part of the principal and shall bear a like interest and *be immediately due and payable*" (Tr. p. 17).

It was also agreed that in the event plaintiff

> *"fails to perform* ANY *of the terms and conditions of this agreement, or shall make default in any payment of principal or interest, then all of the rights of the party of the second part hereto shall terminate and all payments there-*

tofore made shall be retained by the said parties of the first part and treated as compensation for the rental and occupancy of the said land up to the time of such default" (Tr. p. 17).

And that "time is and shall be the essence of this contract."

PRELIMINARY STATEMENT.

It shall be our purpose in presenting this appeal, to rely solely upon the undisputed evidence of the defaults upon the part of plaintiff of the conditions of the contract in question, and, indeed, principally upon his own testimony with respect of those defaults; of his abandonment of the property which he agreed to purchase; of his statements to various persons in the vicinity in which the property is located that he was going to leave the premises; that the property was "no good," that it was a "white elephant," and that he did not intend to put any more of his money into it; his refusal to reoccupy the property after his abandonment and the occupancy thereof by defendants, which occupancy occurred with his consent, and his failure to show his readiness, willingness or ability to perform his contract; and upon his refusal to pay his many obligations with respect of his possession of the property and *his failure to offer to do so.*

These matters we shall point out in detail.

STATEMENT OF FACTS.

At the time plaintiff sought to purchase this property, he represented himself to be a man of great wealth; and able to assume all of the financial obligations of the contract.

PLAINTIFF'S REPRESENTATIONS OF GREAT WEALTH.

We desire to call the Court's attention to plaintiff's testimony (Tr. pp. 232-236) with respect of his financial position, as bearing upon the question of his good faith and intention to carry out his contract, considered in the light of his conduct with respect of the performance of his obligations.

It will be noted from this testimony, that plaintiff claimed to have on deposit in the Russia and English Bank of Petrograd, several thousand pounds sterling. He stated, however, that he had had no communication whatever concerning this account since about four months before the declaration of war—a period of several years. He also claimed to be the owner of one of the largest vessels in the world, and part owner of four others, with office headquarters in London. He did not, however, know the names of the masters or captains of any of these vessels, nor did he know where any of the vessels were, except that they were somewhere in the Pacific Ocean. He mentioned the tonnage of one vessel, but stated that although he had been connected with the other four for a period of 18 or 19 years, that he did not know the tonnage of them;

and, further, that he had had no recent correspondence concerning any of these vessels, and had not received any financial returns from them.

He further testified that he had been an opium trader.

If plaintiff's testimony regarding his financial position be true, then he was wholly without excuse for his failure to perform his obligations under the contract. If, on the other hand, he did not have the financial ability to carry out the contract, then, too, he was without excuse, for, as we shall hereinafter point out, he stated to a great many people that he did not intend to put any more of his money into the enterprise; clearly showing that he was speculating purely on the rise in the value of crops. Such conduct is condemned in Hansborough v. Peck, 72 U. S. 497, 18 L. Ed. 522, hereinafter referred to.

ABANDONMENT OF PROPERTY BY PLAINTIFF.

Immediately upon execution of the agreement of December 1, 1919, plaintiff entered into possession of the premises, and moved his family and household furniture into the dwelling house. He remained in possession until October 9, 1920—a period of ten months—*when he abandoned the property* and moved with his family to San Francisco, taking with him all of his household furniture. At the time of his abandonment of the property, he left in charge thereof an unpaid and dissatisfied employee, Henry Savio, who remained until November

30, 1920, when he, too, left because plaintiff was owing him a considerable sum for wages which was long past due. Upon Savio's departure, the ranch property was left entirely deserted and uncared for.

During plaintiff's occupancy of the premises he utterly failed and refused to perform nearly every obligation required of him under the contract. Most of his breaches he virtually admits in his testimony upon the trial of this action. These we shall enumerate and discuss later.

EVIDENCE SHOWING PLAINTIFF'S CONDUCT IN CREATING DEBTS DURING HIS OCCUPANCY OF THE PROPERTY.

While plaintiff was in possession of the property, he incurred all manner of debts in the locality in which it is situated. He borrowed money from local banks, which he has never repaid; he contracted large bills for groceries, for meat, hay, furniture, piano, farming implements, and apparently almost everything he used during his occupancy of the property, none of which he has ever paid. These debts aggregated several thousand dollars, and are admitted by plaintiff to be due and owing by him. His testimony in this respect, is as follows:

> "Q. Did you owe the Bank of San Jose at that time $1500, or thereabouts?
>
> A. Yes; it was amply covered by a provision for payments.
>
> Q. Have you ever paid it?
>
> A. Not yet.

Q. Did you owe the Garden City Bank at that time $2,350, and interest from June 30, 1920?

A. The same answer applies to that.

Q. Have you ever paid it? A. No.

Q. Did you owe the Bean Spray Pump Company $580?

A. The balance of the amount due on the sprayer, yes, I did owe that.

Q. Did you owe that as a balance due them?

A. Yes.

Q. Did you owe for the tractor $360?

A. In the same way.

Q. Didn't you owe for groceries $185?

A. The same answer applies.

Q. Didn't you owe Wilson for groceries at Cupertino $400 on December 9, 1920, and don't you still owe it to him?

A. That I don't know anything about.

Q. What do you owe him on that?

A. I owed Mr. Wilson, I believe, in the fall; whether he received it I cannot tell you. I am waiting for advice from the Prune Growers Association as to what arrangement was made with that account.

Q. Did you owe the butcher $50?

A. Yes.

Q. Did you owe the man for hay $279?

A. Yes.

Q. Did you owe the Madison Furniture Company $225?

A. I don't know about that amount. I owed them a little.

Q. Did you owe Trunkler Dorman $130 for merchandise?

A. A small amount, but not $130.

Q. Did you owe the City Store $185 for groceries?

A. No; that is a cultivator; it includes tools.

Q. Did you owe the Railroad Company for ties $10, or thereabouts?

A. Thereabouts. As a matter of fact it is half of that amount.

Q. Did you owe the Sloane Furniture Company? A. I did, at that time.

Q. $351.69?

A. I think I did, at that time.

Q. You owed Sherman Clay for a piano which was taken away?

A. It was not taken away. I owed them a balance of payment.

The COURT. Q. Had you received any returns that year at all on your crop?

A. No. Small advances were made on the base payment" (Tr. pp. 135-136).

In this connection we wish to call the attention of the Court to the fact that the advances made to plaintiff on the estimates of the amount of fruit which he delivered to the Canneries that year, were in excess of the amount which he was entitled to. This is shown by the testimony of Mr. Spencer, who was in charge of the accounts for the California Cooperative Canneries.

He stated on cross examination:

"Q. Can you from memory state anything about the quantity of fruit that was delivered to you by the plaintiff? Had he instructed you to allocate any of the returns of that fruit to Mr. Warren? A. Yes sir, he had.

Q. Had you done that? A. No sir.

Q. Why didn't you do it?

A. Because we had issued advances to Mr. Bromley in advance of any accounting whatever, with Mr. Warren's knowledge. * * * We made those advances on estimates; in the final account, the *advances made to Bromley were in excess of what would have been coming to him*" (Tr. p. 202).

In addition to this indebtedness, plaintiff was indebted to his workman, Savio, for wages for labor upon this property. Savio having been unable to collect the money due him, presented his claim to the Labor Commission to procure its aid in that behalf. Mr. David J. O'Neil, Deputy Labor Commissioner for San Francisco, stated that on December 4, 1920, he called on plaintiff with reference to the claim of Savio, and at that time he said to plaintiff:

> "He (Savio) claims that you owe him $340. He says: 'Yes.' He said he acknowledged owing him this money; at present he was not able to make a payment, but if he ever should be able, be in a position to pay the plaintiff, he would gladly do so" (Tr. p. 207).

EVIDENCE SHOWING PLAINTIFF'S ABANDONMENT.

The undisputed evidence shows, beyond a question of doubt, that when plaintiff abandoned the ranch on October 9, 1920, he had no intention of ever returning or of fulfilling his contract. At that time he was in default for interest amounting to $773.65 due defendants on the balance of the purchase price of the property, and for taxes amounting to several hundred dollars which defendants had been compelled to pay by reason of plaintiff's failure to do so, as required of him under the contract, and which, under clause 15 of the contract, he was obligated *to immediately refund to them;* he was also in default in many other obligations under the contract, such as replanting trees, plowing, etc. At the time of his abandonment he left the property in care of

an employee whose wages he had not paid, and he also left behind him a large number of other debts which he has never paid.

Plaintiff, himself, testified that he had no intention of returning to the property except on an occasional visit, and that he had no intention of employing any one to care for the place *from November 30, 1920, until February 1, 1921.*

He did not deny that prior to his abandonment of the property, he had stated to Mr. Wilson, owner of a merchandise store at Cupertino, who endeavored to collect a debt owing him from plaintiff, that "the ranch was not profitable—was not a profitable investment" (Tr. p. 112), nor did he deny that to many other people he had expressed his intention of giving up the property; that it was a "white elephant"; that it was "no good"; that he did not intend to put any more money into it, and that he was going elsewhere where he could better his financial condition.

Plaintiff testified, when asked on cross-examination if he had not had a conversation with the defendants in November, 1920, at which time he told them he had no money to pay the balance of the interest due on December 1st, or to care for the property, and that he was going to discharge his man because he could not pay his wages:

> "Yes. This probably transpired at the same time—that I was owing my man his wages; that I could not pay him, he would be paid later on; he was leaving me to find work. I also told them that all the work necessary to be done was

> finished up to the end of November, or would be, and that I had started my business in the city as a means of obtaining sufficient income to keep myself, and also provide funds for the overhead of that orchard, which was—I believe I used the expression to Mr. Warren—that it was, a 'white elephant'. I used that expression to other people as well'' (Tr. p. 133).

Mr. Archibald Wilson, a witness for defendants, an owner of a merchandise store in Cupertino, testified:

> "I saw Mr. Bromley at his ranch on or about the first of October, 1920. I had a conversation with him. * * * I called upon Mr. Bromley with reference to an account owing us. He said in the course of the conversation that he was without funds, and that while he had funds in other countries that he did not propose to invest any more of those funds in the Warren ranch proposition. He also told me that the ranch, to use his own language, was 'no good' '' (Tr. p. 215).

Mr. Ralph G. Spencer, a witness for defendants, who has charge of the growers and fruit account of the California Cooperative Canneries, in San Jose, testified that plaintiff called on him in October, 1920, to procure further advances on the fruit which he had delivered to the canneries from this ranch. Mr. Spencer testified:

> "Our practice is to make advances as soon as possible; he had had partial returns. I explained that all the advances had been made that could be made at that time, and particularly in view of the fact that under his instructions there was a proportion of it to go to Warren. He said, to my recollection, the substance would be that he was expecting to go to

> San Francisco and engage in some other business. He expressed disappointment with the outcome of the transaction. I recall the use of the words 'white elephant' on that occasion. I recall that *he said he expected to leave the place* and go in some other occupation where he could make better returns for himself, to meet his requirements. To the best of my recollection *it was in the early part of October"* (Tr. p. 200).

Miss Maud E. Empey, bookkeeper for Crothers Realty Company, stated that plaintiff called at the office of that company in August or September, 1920, and discussed with her some of his troubles on the ranch. She testified:

> "I remember that he said that he wanted to know if the fruit would not be liable for the pickers' charges, and whether they could not look to all fruit,—to Mr. Warren's interest as well as the other, for their compensation; and then he stated that he had spent all of his money, that he was not going to, and no more of his private funds should go into the place" (Tr. pp. 204-205).

And Miss Nola, bookkeeper for Elmer Brothers Nursery, with whom plaintiff had personally placed an order for trees to be planted on this property, and with whom he subsequently,—October, 1920—placed a cancellation of this order, testified:

> "Q. Did Mr. Bromley, in connection with the cancellation of that order, make any statement to you, and if so, what?
>
> A. As I recall at the time *he said he was going to leave town"* (Tr. p. 203.)

Mr. Joseph T. Brooks, connected with the Growers' Information Bureau of the California Prune and Apricot Growers' Association, Incorporated, testified:

> "I know Mr. Bromley. I have known him since the early part of 1920. In the fall of 1920 I had a conversation with Mr. Bromley in the office of the Association. * * * It was the latter part of October, 1920. *Mr. Bromley stated that he expected to give up the property and go north* because of his circumstances. Because of the financial situation there was a conversation in which the financial situation came in later on, if I am at liberty to state it" (Tr. pp. 205-206).

These facts were known to defendants, and, in conjunction with the many breaches of plaintiff of his contract, his failure to pay the taxes when due, or to reimburse defendants for the payment thereof; his failure to pay the interest due defendants; his failure in every requirement made of him under clause 4 of the contract which provided for the proper care and management of the property, all of which we shall set forth later, and, most important of all, his complete abandonment of the property on October 9, 1920, certainly justified defendants in their belief that plaintiff did not intend to ever return to the place or perform his contract.

Plaintiff's own testimony, on cross-examination, is:

"I moved to San Francisco October 9th. On the 30th of November I had a long talk with Mr. Warren.

Q. Did you tell him in the middle of November, 1920, you and he being present, that you had no money, that you were discharging the man and were quitting the place,—or words to that effect?

A. Certainly not quitting the place. I had no intention of doing such a thing.

Q. Did you tell him you were discharging the man? A. Yes.

Q. To whom did you have reference to when you said you were discharging the man?

A. Savio.

Q. You had no one else there but Savio?

A. No.

Q. Was anyone in occupancy of that place on December 7, 1920?

A. Not to my knowledge.

Q. Was anyone in occupancy of that place at any time between December 1, 1920, and December 8, 1920, to your knowledge?

A. *Mr. Warren had access to the house the whole time,* but no one was living in the house.

* * * * * * *

Between October 9, 1920, and December 8, 1920, I had moved away nearly all my furniture. What was necessary for that house I had in my house in San Francisco. I know that a ranch needs care.

* * * * * * *

Q. Between the first of December and the 8th of December how often were you there?

A. I don't think I was there from November 30th.

* * * * * * *

I made no arrangements for the care of the ranch; there was nothing whatever to do; no work was necessary to be done on the ranch.

* * * * * * *

Q. What work did you expect to do there and have done during December and February?

A. There was nothing to do.

* * * * * * *

Q. You had no man in charge of that place during that time? A. No.

* * * * * * *

Q. Were you there between December and February?

A. There was no need to be there.

Q. Were you there after relinquishing the place?

A. When Warren took possession of the orchard I washed my hands of it, and told him so.

* * * * * * *

Q. You know there was no one in charge when they made that entry: That you know to be so?

A. No one in charge" (Tr. pp. 108, 109, 124, 126, 128).

In direct and absolute contradiction of the absurd statements of plaintiff that no work was necessary to be done from November 30th until February first, on this ranch comprising fifty-five acres of fruit trees, and valued at $51,000, is the testimony of Mr. Warren which is proof positive that certain very important and material work was necessary to be done at that particular time:

"When I went there in December 8th, I found that the pruning had to be done. The brush had to be picked up, spraying had to be done. You had to remove old trees, so you could replant others, and get the ground into condition for water when it came down the creek for use. I put three men to pruning. I put one man to picking up the brush. In my opinion as an orchardist that work was abso-

lutely necessary. It takes three men to prune 50 acres about a month and a half. My men were employed there about a month and a half. I paid those men. I picked up brush; took trees out so we could replant, and got the ground in condition so we could begin to irrigate. I removed the trees for planting the other trees, ripped up the ground, preparing it for water; when the water came, I started the pump and was irrigating. I dug up prune and apricot trees. They were girdled with gophers, and I had to take them up. They were dead trees. I replanted 560 trees'' (Tr. pp. 176-177).

ENTRY BY DEFENDANTS WAS FOR THE PURPOSE OF PROTECTING THEIR PROPERTY AND IN NO WISE DAMAGED PLAINTIFF, WHO IMMEDIATELY AFTER THEIR RE-ENTRY DECLINED TO RETAKE POSSESSION OR PERFORM HIS OBLIGATIONS.

On December 8, 1920, defendants, knowing that this valuable property had been deserted since November 30th, and that *plaintiff by his own statements,* did not intend to give it any care or attention until February first at the earliest,—a period of at least two months,—deemed it their right and duty to enter upon the premises for the purpose of protecting their own interests therein. Because of plaintiff's conduct, defendants believed that he had no intention of employing any one to look after the property again, or to do so himself, and on December 8, 1920, they notified plaintiff that because of his failure to perform many of his obligations under the contract, they had elected to terminate the contract and had taken possession of the property, treating

moneys theretofore paid on the purchase price as compensation for the rental and occupancy of the land, as provided by section 16 of the agreement.

No reply was made by plaintiff to this notice, and on January 7, 1921,—a month later,—plaintiff stated in the office of defendants' attorney, Mr. E. A. Wilcox, of San Jose, that it was his *intention to give up the ranch, that he did not want it; he was dissatisfied with it, and he would not take it back if it was given to him.* This is shown by the testimony of Mr. Frank G. King, a witness for defendants, and is not denied by plaintiff. Mr. King testified:

> "I know Mr. Bromley. I know Mr. Edwin A. Wilcox and have known him a number of years. I had a conversation with Mr. Wilcox, and I took Bromley up to his office; he was evidently dissatisfied with the purchase of his ranch. I had a conversation with Mr. Bromley on or about January 7, 1921. Mr. Bromley stated *it was his intention to give up his ranch, he did not want it; he was dissatisfied with it, and he would not take it back if it was given to him*" (Tr. p. 206).

PLAINTIFF PERMITS DEFENDANTS TO RE-ENTER, AND THEN SUES THEM FOR DAMAGES FOR DOING SO.

Although no reply was made to the notice sent to plaintiff, and although he stated on January 7, 1921, that he would not take back the property or carry out his contract, he subsequently filed an action, similar to the present one, in the Superior Court of Santa Clara County. A demurrer was filed to his

complaint, and was sustained, the Court holding that defendants had not breached their contract by taking possession of the land, but that plaintiff was in default (Tr. pp. 94-95). He later dismissed that action, and on June 27, 1921, commenced another in the District Court, alleging that he was a British subject.

It is admitted by plaintiff that defendants were rightfully in possession of the property up to February 1, 1921. They were there at his request. This is shown by his own testimony and that of Mr. Warren. Plaintiff admitted that he had requested them to look after the property during his absence. He also stated that after he left the property on October 9, 1920, "Mr. Warren had access to the house the whole time" (Tr. p. 108). And prior to his departure from the ranch, he had stated to defendants that if any work was done on the place before February 1, 1921, they would have to do it (Tr. p. 177).

On January 7, 1921,—only one month after defendants' re-entry, *and three weeks before plaintiff, by his own statements, had intended to return to the property,* he had a conversation in the office of Mr. Wilcox, defendants' attorney, in which the property was offered back to him, but which offer he refused. This is shown by his own testimony:

> "Q. Did you have a conversation with Mr. Wilcox at that time and place, those persons (Mr. Wilcox, Mr. King and plaintiff) being present, in which you said, in substance, that you would not take back the place as a gift, and

that the personal property on the place which you had left there you cared nothing about; and didn't you state as to the horse that they could do with it as they pleased,—or words to that effect in substance?

A. I would say 'No.' Then I will give my explanation: After considerable conversation with Mr. Wilcox respecting the letter he had written to me, against which I protested, *the conversation turned to, would I take the place back?* I said: *'No, not after this action.'* With reference to my personal belongings, I made the reply: 'Those would be subject to after consideration.' With respect to the horse, I forget exactly my words, but I know everything that was left there on the orchard at the date when Warren and his attorney took that action—

The COURT. (Intg.) *What action are you speaking of?*

A. (Contg.) *Taking possession.* Those articles were subject to the same conditions'' (Tr. pp. 219-220).

Thus, according to plaintiff's own admission, he did not want the property. On the contrary, when he was offered possession, he refused it. Up to this date,—January 7, 1921,—he had not claimed any damage by reason of defendants' entry, which entry, as we have shown, was with plaintiff's consent. And indeed, without his consent, defendants had the right, under the circumstances, to enter in order to protect their valuable property from wreck and ruin.

Plaintiff did not only refuse to again enter into possession of the property, but he did not offer to

pay for any of his defaults. At that time there was admittedly due and owing to defendants from plaintiff the moneys paid by them for taxes, which plaintiff had failed to pay, and the interest on the balance of the purchase price; not to speak of plaintiff's neglect in the way of farming the property, which, of course, could not be repaid by money.

BREACHES OF CONTRACT BY PLAINTIFF.

We cannot conceive of a more flagrant violation of a contract than that of plaintiff in the present case. He violated nearly every condition agreed to by him, and then willfully and deliberately abondoned the property, and announced his intention of giving up the property. We desire to set forth with some particularity, the various breaches of plaintiff, as admitted and necessarily implied by the testimony.

(1) Taxes.

Under section 10 of the contract, plaintiff agreed

> "to pay all taxes and assessments of whatever description which shall be hereafter assessed against said property until the payment of the full purchase price herein agreed to be paid."

A serious and inexcusable breach of the contract upon the part of plaintiff, was his total failure to pay either of the two installments of taxes which ac-

crued during the period of his possession. Upon his direct examination (Tr. p. 102) he testified:

> "Mr. Barendt. Q. Did you pay the first installment of taxes on this property, rather the second installment, some time between the first of 1919, and April or May?
>
> A. No; on that occasion I wrote to the Tax Collector asking if he would hold that over.
>
> Q. You are familiar with the method of paying taxes here in two installments,—the fiscal year is from July 1st to June 30th?
>
> A. Yes.
>
> Q. They are payable in two installments?
>
> A. Yes.
>
> Q. When you took possession there would be the second installment coming due in the following spring? A. Yes.
>
> * * * * * * *
>
> Q. The taxes in November you did not pay?
>
> A. No, I asked them to hold them over with interest until they were due on the next occasion, or when it was convenient for me to pay it."

When asked whether he had a copy of the letter which he claims to have sent to the tax collector, plaintiff replied that he did not think he had (Tr. p. 116). Granting, however, that he did write such a letter, that would not relieve him. In this State taxes become due and are payable at a certain time, and if they are not paid when due, they become a lien against the property assessed, which can only be extinguished by the payment of the taxes, or by selling the property for non-payment thereof. Plaintiff admits that he failed to pay the two installments of taxes which became due during his occupancy of

the property, and at no time has he offered to reimburse defendants for paying them. Clause 15 of the contract in no way modified the liability of plaintiff to pay the taxes when due, or obviated or excused the breach necessarily arising from non-payment. Clause 15 reads as follows:

> "That in the event said party of the second part fails to pay any of the assessments, insurance premiums, liens or encumbrances on or affecting said property *when due,* the parties of the first part retain the privilege of paying the same and upon doing so, said amount or amounts so paid shall thereupon become a part of the principal and shall bear a like interest and *be immediately due and payable.*"

This section must be read in connection with section 10 of the contract, which creates an *unconditional primary obligation* on the part of the plaintiff to pay all taxes assessed against the property. It must likewise be read in connection with section 17, which makes *time of the essence of the contract.* The obvious purpose of section 15 was to safeguard the property against liens and encumbrances resulting from non-payment of taxes, by permitting defendants to pay them in the event of plaintiff's failure to do so; and, further, to provide for the *immediate* reimbursement of defendants in case they should pay the taxes. No other construction can be placed upon this clause of the contract. It was not intended that plaintiff should be permitted to defer his payments of taxes for a period of five years, throwing the entire burden and responsibility for

the payment thereof during the whole of that time upon the defendants, without immediately reimbursing them for the amounts so paid. Yet this is the attitude of plaintiff assumed in this action. Notwithstanding the fact that by his own admissions he failed to pay any taxes which became due during his occupancy of the property, as called for by the contract, and that he has never at any time offered to reimburse defendants for the amounts which they paid therefor in order to save the property, he contends that he has fully performed all the terms and conditions of the contract on his part to be performed. The payment of taxes was a very material obligation upon the part of plaintiff, and his failure to perform that obligation either by the payment of taxes or by the immediate reimbursement to defendants of the amounts paid by them, was a serious breach of his contract.

(2) Interest.

Under section 3 of the contract plaintiff was required to pay interest on the unpaid portion of the purchase price *annually* at the rate of 6 per cent. The sum of $6000 had been paid by plaintiff upon execution of the contract. This left a balance of $45,000 still to be paid on the purchase price. Therefore, on December 1, 1920, the sum of $2700 was admittedly due defendants as interest. Plaintiff admitted, upon cross-examination, that he had made no direct payments of interest whatsoever to the defendants.

"Mr. SCHLESINGER. Q. Did you pay any interest outside of the credit being allowed for the fruit which was sold to the canneries, have you paid any interest?

The COURT. Outside of that which would be derived from the receipt of the fruit?

A. No, unless the moneys received from the sale of the grapes are paid against the interest accruing" (Tr. p. 118).

But plaintiff would contend that by virtue of two provisions of the contract, to wit: Section 3 and section 7, he was relieved of all obligation to make direct payments of interest to the defendants when due.

Section 3 reads as follows:

"The balance of said purchase price, to wit: the sum of Forty-five Thousand ($45,000) Dollars shall be paid in lawful money of the United States of America on or before five years from this date, together with interest thereon from date until paid at the rate of six per cent net per annum, *payable annually,* and if not paid as it becomes due, it shall be added to the principal, become a part thereof and thereafter bear interest at the same rate" (Tr. p. 13).

Section 7 reads as follows:

"It is understood and agreed that when said crop is ready for the market, the party of the second part will notify the parties of the first part that he is ready to sell and state the price at which he is willing to sell, and if said price is the market price for the fruit at that time, the parties hereto agree to consent to the sale of said fruit and shall thereupon sell said fruit in

> the joint names of the parties of the first part and the party of the second part in the proportion of 60% in the name of the parties of the first part and 40% in the name of the party of the second part, and the portion which shall go to the parties of the first part shall be by them credited on unpaid interest and the balance on the principal hereof, as herein agreed" (Tr. p. 14).

In a contract, such as the one here under discussion, which contains a clause (section 3 quoted above) specifically making interest *"payable annually,"* and in which *time has been expressly made of the essence* (section 17), provisions like those mentioned above are not to be so interpreted as to relieve plaintiff of his obligation to make direct payment of interest himself when due. Such an interpretation would amount to a gross violation of the obvious intention of the parties.

If clause 3 were so interpreted as to obviate or excuse the breach which would otherwise be occasioned by non-payment of interest *when due,* it would in effect destroy the primary and unconditional liability of plaintiff to pay the interest *"annually,"* that is, *on time,* and would reduce his obligation to a mere requirement to pay interest *at any time within five years.* Such an interpretation would likewise render nugatory section 17, which makes time of the essence of the contract. Where time has been expressly made of the essence of the contract, that urgency, whether or not it exists in fact, must be conclusively presumed. This, we submit, is the

inherent meaning of a clause making time of the essence.

Clause 7 was not meant to obviate the requirement of *direct* payment of interest *by the plaintiff himself* when due. That clause provides that "the portion which shall go to the parties of the first part shall be by them *credited* on *unpaid* interest and the *balance* on the *principal thereof* as herein agreed." *"Unpaid interest":* If the parties did not contemplate the *direct* payment of interest *when due, by plaintiff himself* to the defendants as the proper and normal mode of paying the interest, why then, did they employ the expression *"unpaid interest."*

The amounts of money to be credited to the plaintiff as interest, and the times at which money to be so credited would be received by the defendants, were necessarily uncertain by reason of that method of disposing of the crops which the parties had agreed upon. This uncertainty was doubtless within the knowledge of the parties. It cannot be fairly argued that an obligation to pay definite amounts of interest at definite times (as provided in section 3 of the contract) could be fully and satisfactorily met by an indirect mode of payment, very uncertain both as to time and amounts. Such was obviously not the intention of the parties, particularly in view of section 17, making time of the essence. The clear purpose of section 7 was not to relieve plaintiff of his obligation to pay interest himself directly and promptly when due by setting up another plan whereby he might properly meet this

obligation, but merely to secure the defendants *in the event of plaintiff's default.*

Mr. Warren testified that the total amount which he received from all fruits sold in 1920, being the 60% provided for in the agreement, was $1926.35. (Tr. p. 184).

This left unpaid on December 1, 1920, $773.65 of the amount due as interest on that date. There is nothing in the testimony indicating that at any time thereafter defendants actually received any additional sums of money; and even if they had, this would not have excused plaintiff's breach because time had been expressly made of the essence of the contract. At no time was this unpaid interest tendered to defendants, or any offer made by plaintiff to pay the same.

We submit, that this contract contains but one engagement on the part of plaintiff with respect of the payment of interest, and that is, that plaintiff shall pay the interest annually when due. The provision that the title to 60% of the crops grown on the orchard each year shall remain to the credit of defendants toward the payment of interest, is solely for the purpose of securing defendants for the interest to that extent, but does not in anywise relieve plaintiff from his obligation to pay the full amount of interest annually when it became due.

Under clause 4 of the contract, plaintiff was required, and agreed, to do certain particular things. The evidence shows conclusively that he failed in each one of these requirements.

(3) Farming premises in a first-class, farmerlike, orchardistlike manner.

Under this clause of the contract, plaintiff was required to farm the premises in a first-class, farmerlike, and orchardistlike manner. This he utterly failed to do. His attempt to vindicate himself for his complete failure in this respect by stating that he was not an expert orchardist, should not relieve him of his responsibility. He stated that he had had some previous experience as an orchardist, and as such had been successful. However, his experience or inexperience in that respect, has nothing whatever to do with the terms and conditions of this contract. He voluntarily executed the contract, assuming the obligations called for by it, and we submit that it was his duty, under the circumstances, if he felt himself personally incapable of operating the ranch in compliance with the terms of the contract, to have secured proper advice and adequate labor for that purpose. He, however, not only failed to do this, but refused, in many instances, to heed the advice which was gratuitously offered to him by Mr. Warren, Herbert Pash, and others, who were expert orchardists.

Mr. Warren testified that upon many occasions he attempted to advise plaintiff as to the proper manner of irrigating the ranch, and upon each occasion plaintiff would reply that he would take care of the ranch (Tr. p. 217). And Mr. Herbert Pash,

a witness for defendants, on cross-examination, stated:

> "I am a friend of Mr. Bromley's. I paid him friendly visits from March to October. Mr. Bromley asked my advice, and after I gave it, he argued on it. He did not follow my advice."

Mr. Pash, who is an expert orchardist, testified on direct examination that he had lived just across the road from this ranch for a period of twenty years, and was thoroughly acquainted with it, and that during the occupancy by plaintiff he visited the ranch about fourteen or fifteen times. He further stated:

> "Q. What did you observe on those visits?
> A. I noticed the result of the irrigation, and the method of preserving the moisture in the soil. I noticed the condition of the trees, and the condition of the soil.
> Q. What in your opinion, was it as to his management, as to being farmerlike or orchardistlike?
> A. *To my idea it was very unfarmer-like.* He did not do what I would have done; and he did what I should not have done.
> * * * * * * *
> Mr. SCHLESINGER. Q. What did you see with respect to the trees and general conditions?
> A. I noticed that the trees were suffering from want of moisture. The fruit in July apparently had suffered from loss of moisture and had dropped. *The reason of the loss of moisture was the way the orchard was cultivated"* (Tr. pp. 209-210).

Plaintiff utterly failed to do any plowing whatsoever. On a ranch of this character, it is abso-

lutely imperative in order to farm it properly, that plowing should be done. Mr. Warren, who had owned the ranch for eleven years and had farmed it successfully during the whole of that time, testified:

> "The place was not plowed in 1920. Part of it was double disced two or three times, the other part once. About one-half of it was double disced" (Tr. p. 175).
> * * * * * * *
> "In February, 1920, Mr. Bromley had not plowed that place. In February, March or April of 1920, Bromley used what we call a disc harrow. It is not the equivalent to plowing. The proper treatment between December and April of 1920 of that soil would be to plow it first, then you can use a disc harrow, or disc cultivator after that to keep the ground mixed. The purpose of plowing is to stir up the ground thoroughly and turn it over, so that the ground may be turned up to the sun, to stir up the hard dry fields there, packed from the rains during the winter. The effect of the lack of that on the part of Mr. Bromley on the prune production was that the moisture goes out of the ground when you do not plow that with a cultivator thoroughly, and the fruit does not mature and the trees suffer very materially" (Tr. pp. 183-184).

I. Okumura, a witness for defendants, who worked for plaintiff from December 1, 1919, until April 11, 1920, testified:

> "While I was there Mr. Bromley did not do any plowing on the place. The proper time for plowing was about the first of February. I talked with Mr. Bromley about plowing. He said: No plowing, just discing and harrowing. * * * I had a talk with him about that. I

says: Better plow first, then with a disc, then after with the spring cultivator" (Tr. p. 218).

Plaintiff admitted on cross-examination that he failed to cultivate or irrigate one and one-half acres of walnut trees, and seeks to excuse himself therefor by stating that this portion of the ranch had been "roughly plowed in the wet season and left in that condition and the furrows were as hard as bricks" (Tr. p. 106).

This excuse is certainly not justified, inasmuch as plaintiff himself was in possession of this land during the wet season, having entered on December 1, 1919, and if the ground was in the condition which he stated, he alone was responsible therefor. He had ample opportunity to cultivate it at the proper time and in the proper manner.

As to his obligation "to spray the pear trees each year as often as it is customary so to do", plaintiff admitted on cross-examination that he only sprayed the pear trees twice during the entire season; once in February and again on May 18th, and that he did no spraying after that. That was the extent of his performance in that regard.

As to plaintiff's mismanagement of the property during his possession, Mr. Warren testified:

> "When I turned the orchard over to Mr. Bromley it was in first-class condition, and the year prior produced $19,000. When I re-entered the place it was very much neglected. * * * *He did not succeed in raising crops the equal of any produced on similarly situated land.* His acts did not increase the value of

that land. *His acts decreased the value of the land to the extent it will take me five years at least to put it back into the condition it was when he received it"* (Tr. p. 184).

It is very significant that plaintiff did not call as a witness to testify in his behalf as to his management and care of the property, his former employee, Savio. The testimony of his other employee, Okumura, was very much to his discredit.

(4) Removal of dead trees.

Under clause 4 of the contract, plaintiff was required to "remove all dead trees".

It is clear from the evidence that he did not comply with this condition of the contract. His own testimony in this respect was very indefinite and evasive. When asked on direct examination if he had removed any of the dead trees, he replied, "I removed some of the dead trees" (Tr. p. 106). The testimony of Mr. Warren, however, of the work which he found it necessary to do upon the land immediately after re-entering, is very definite, and to our minds, conclusive, upon this subject. He testified:

> "I had to remove old trees, so you could replant others, and get the ground into condition for water when it came down the creek for use. * * * I picked up brush; took trees out, so we could replant, and got the ground in condition so we could begin to irrigate. I removed the trees for planting the other trees, ripped up the ground, preparing it for water; when the water came, I started the pump and was irrigating. I dug up prune and apricot trees. They were girdled

> with gophers, and I had to take them up. They were dead trees. I replanted 560 trees. Not to my knowledge had there been any trees replanted or dead trees dug up during the time of Bromley's occupancy. There were no trees replanted. I don't think any dead trees had been dug up. I examined the place" (Tr. p. 177).

In view of Mr. Warren's testimony, which has not in any wise been controverted, together with plaintiff's statement that he removed only *some* of the dead trees, and the fact that he offered no excuse whatever for his failure to remove the remainder, we submit that plaintiff clearly violated this provision of the contract.

(5) Replanting.

Under clause 4, plaintiff was required to "remove all dead trees, and as soon as customary thereafter replant the same with apricot or prune trees".

According to plaintiff's own testimony, he did not replant any trees whatsoever. He testified (Tr. p. 130):

> "After removing the dead trees *I did not replant any trees.* I ordered trees for replanting and cancelled the order.
> * * * * * * *
> I don't know how many trees should have been replanted in lieu of the dead ones, but I bought 300 trees, and that is the order I had cancelled."

There could not possibly have been any question as to the great necessity for replanting trees. As

we have pointed out, there was a large number of dead trees on the land, and it was plaintiff's duty under the contract, to remove these and replant others. This he utterly failed to do.

Mr. Warren testified that immediately after his re-entry upon the land, he replanted over 560 trees (Tr. p. 177). Plaintiff fully realized the necessity for replanting trees, for on July 26, 1920, he placed an order for 300 trees with the Elmer Brothers nursery in San Jose. Subsequently, however, on October 20, 1920, *after he had left the ranch* and moved his family and all of his furniture away, he cancelled this order. His answers to the questions propounded to him upon this subject, were as evasive as his answers to almost every other question asked him during his entire examination. He testified on cross-examination:

> "I know the concern of Elmer Brothers, nurserymen in San Jose. On July 26, 1920, I believe I left an order with them for 300 trees. I wanted to comply with my contract concerning replanting.
>
> Q. Did you subsequently, on the 20th day of October, 1920, cancel that order, stating to the young lady who was the bookkeeper there, that you wanted to cancel the order because you no longer had any use for the trees, as you intended to leave the country—answer 'yes' or 'no'.
>
> A. No. If I may be allowed to explain, I cannot give you the exact date, it was young Elmer himself I saw; it was on one of my visits to San Jose; it was after Christmas, I think in January, I told him that I should not need those trees, could he cancel the order.

The COURT. Q. When were the trees ordered for?

A. As soon as possible; when the proper time for planting came.

Q. At the time when you gave the order?

A. When the rain comes.

Mr. SCHLESINGER. Q. Didn't you, as a matter of fact, cancel the order for those trees on or about the 20th day of October, 1920?

A. I don't think so. I think the order was cancelled after Christmas, when I saw young Elmer himself. It was when I visited San Jose, after I had been living in the city here.

Q. Don't you know that you cancelled that order after you left San Jose with your family, taking with you your household furniture—wasn't it shortly after that time you cancelled the order for the trees?

A. After I left San Jose, yes" (Tr. pp. 110-111).

Although plaintiff testified that he kept a diary stating from day to day what he did on the orchard, and made entries therein each night (Tr. p. 97), and was permitted by the trial Court to read therefrom, he does not seem to have entered therein the date upon which he cancelled the order for the 300 trees which he had previously given. He realized at the trial of this case, that it would be greatly to his advantage if he could make it appear that he had not cancelled the order until after Christmas, because the fact that he cancelled it only a few days subsequent to his removal from the ranch, *revealed all too clearly that it was done in furtherance of his plan to abandon the ranch.* The testimony of both plaintiff and defendants shows that he left on October 8, 1920, taking with him his family and all of

his household furniture. *The order for trees was cancelled on October 20, 1920.*

Although plaintiff endeavored very assiduously to avoid admitting that he had cancelled the order for trees in October, 1920, and to make it appear that he had not done so until after Christmas, the evidence on this point is definitely and conclusively established by the testimony of Miss Nola, bookkeeper for Elmer Brothers Nursery, with whom plaintiff placed the order for the trees, and also with whom he personally placed the order for cancellation thereof. This witness testified:

> "Mr. SCHLESINGER. Q. Do you know F. G. Bromley?
>
> A. Yes.
>
> Q. Did your concern receive any order from Bromley?
>
> A. Yes, but it was cancelled.
>
> Q. When was the order for these trees cancelled?
>
> Mr. BARENDT. If you know, of your own knowledge.
>
> A. *On October, 1920; I put it on the card myself.*
>
> Mr. SCHLESINGER. Q. Did Mr. Bromley, in connection with the cancellation of that order, make any statement to you, and, if so, what?
>
> A. As I recall at the time *he said he was going to leave town.*" (Tr. p. 203.)

Therefore, it is shown by the undisputed testimony that plaintiff utterly failed to comply with the provision of the contract requiring him to replant trees. He offered no excuse whatever for his failure to do so, and, we submit, that this breach

constituted a serious violation of the provisions of the contract.

(6) Irrigation.

Under section 4, plaintiff was required to irrigate the orchard each year when the water was available. The testimony clearly shows that he failed to irrigate *large portions of the land;* that he failed to heed the advice given him by experienced orchardists with regard to irrigation, and that he worked relatively short hours at a time when it was imperative to work very long hours in order to utilize fully the water supply at hand. Mr. Herbert Pash, who frequently visited the ranch while plaintiff occupied it, testified:

> "Mr. SCHLESINGER. Q. What did you see with respect to the trees and general conditions?
>
> A. I noticed that the trees were suffering from want of moisture. The fruit in July apparently had suffered from loss of moisture and had dropped. The reason of the loss of moisture was the way the orchard was cultivated.
>
> * * * * * * *
>
> The consequence of not having water in the soil on his prune trees on the flat caused them, in my opinion, to drop in July.
>
> * * * * * * *
>
> In fact, to put it in a few words: The orchard was suffering from lack of moisture. *He could have put the moisture on if he wanted to. There was water enough in the creek to irrigate the whole place over.*"

We next qoute from the testimony of Mr. Warren:

"There was water available for the adequate irrigation of that ranch during the year 1920. Mr. Bromley irrigated about one-third of the place fairly well, and about one-half of the place,—that is, I should say about one-half of the place was irrigated partially. *You might say one-fourth of the place was irrigated fairly well.* He did not succeed in raising crops the equal of any produced on similarly situated land" (Tr. p. 184).

"Mr. SCHLESINGER. Q. Were you familiar with the water there during the year 1920?

A. Yes.

* * * * * * *

There was plenty of water. *Of course, in a year like that you have to use your common judgment, and work long days and nights, so as to be sure you are going to get the water.*

Q. Did you have any conversation during the year 1920 upon that subject with Mr. Bromley?

A. A great, great many of them; *about once a week during that season I talked to Bromley about water.*

Q. What did you say?

A. I said, 'Mr. Bromley, you ought to work longer days, and ought to work nights, to be sure you are going to get plenty of water for the ranch'. I said: 'If it runs later on so much the better, but be sure you get enough water'. He said *he would take care of the ranch; that is all I could get out of Bromley on any of my talks to him*" (Tr. pp. 216-217).

I. Okumura, who had worked eleven years for defendants and from December, 1919, to April, 1920, for plaintiff, testified as follows:

"The water conditions there from the first of January, February and March there was

plenty of water in the creek. *He started at 10 o'clock and quit at 5 o'clock at night.*

Mr. SCHLESINGER. Q. Did you have any talk with him about pumping the water, about starting the motor?

A. Yes, starting the motor; the first time I worked for Mr. Bromley I start the motor 7 o'clock myself. Then Bromley says: 'Do not start so early'. So I start the motor myself; he did not start the motor before 10 o'clock.

Q. What time should the motor have been started?

A. The motor should have been started about 5 o'clock in the morning; quit about half-past eight; plenty of water in the creek then; bye-and-bye, not so much.

Q. You say there was plenty of water in January, February and March?

A. Yes" (Tr. pp. 218-219).

Plaintiff sought to justify his breach in regard to irrigation by claiming that there was not sufficient water available. But the testimony shows that the supply of water was adequate, and that the failure to irrigate properly resulted rather from too short hours, insufficient effort, and lack of interest and proper management on the part of plaintiff. He attributed his failure to irrigate properly in part, to the age and condition of the pump; but he fails to show that he ever employed anyone to overhaul or repair it. Furthermore, Mr. Warren used this same pump in the previous year and the ranch produced in that year the sum of $19,700.

(7) Pruning.

Under clause 4, plaintiff was bound to "prune said trees at the proper time each year and so far

as is possible remove all borers from the roots of the same".

On cross-examination, Mr. Warren testified:

> "Q. Did you ever say anything to Bromley about pruning in November?
>
> A. I spoke to him about the way his man was pruning the trees in November, 1920.
>
> Q. Then he was pruning in 1920?
>
> A. The man was cutting trees to pieces in a most ridiculous manner. * * * His man would go out and prune a tree here and go off in another part of the orchard and prune a tree, and cut the trees up to pieces. I do not call that pruning. His man admitted to me he did not know anything about orchard work, and Mr. Bromley admitted it to me" (Tr. p. 191).

Plaintiff admitted on direct examination, that the pruning of the orchard during his occupancy was improperly done (Tr. p. 101). He attempts, however, to justify this breach by laying the blame upon his employee. However, under the contract, plaintiff was required, regardless of the extent of his own personal experience, to provide first-class farmer-like, orchardist-like management of the ranch. It must be presumed that he knew and understood the obligations which he was assuming at the time he executed the contract, and he certainly should have used his best endeavors to have fulfilled those obligations. He could hardly expect the defendants, who had far more at stake in the premises than he, to be the only sufferers for his failure to do the things which he was required under his contract to do.

It is thus shown by the evidence that plaintiff violated nearly every provision of the contract. His mismanagement of the ranch during his possession, resulted in much damage to the property, and in a great loss during that year on the income therefrom. It was shown that in 1919,—the year prior to the possession by plaintiff, the ranch earned $19,700. In the year 1918 it produced about $7000, and in 1917 about $6000. In 1920, however, the year which plaintiff was in possession, the defendants received as sixty per cent of the total yield of the crops the sum of $1926.35. Plaintiff received forty per cent. By computation, therefore, the total yield for the year 1920 was approximately $3210,—or less than one-half of the average yield of the ranch under the management of defendants.

And not only did plaintiff violate his contract during his possession, but as we have shown he abandoned the property on October 8, 1920, and took up his residence in San Francisco, leaving the place in the care of Henry Savio, an employee, who, on November 30th, also abandoned it because of plaintiff's failure to pay him his wages. The place was then left entirely without care or attention.

Mr. Warren testified:

> "I re-entered that place on December 8, 1920. * * * I entered the place because it was not being taken care of. There was no one on the place. I had to look after my own interest. I had a conversation with Bromley prior to re-entering. I had one, the last one I had with him was in the latter part of November, 1920,

and Mr. and Mrs. Warren were present. Mr. Bromley on that occasion said: 'I came down to see you if you would not do the work on the place'. I says: 'Mr. Bromley, I have more work than I can really attend to myself; I am not going out to work for somebody else.' He said, 'I am going over to tell my man to leave, *and if anybody does any work on the place before February, you will have to do it'.*"

* * * * * * *

"When I entered the house on that land the house was open; the doors were unlocked; some of the doors were open. There was no one in charge" (Tr. pp. 177, 178).

ARGUMENT.

As we have pointed out, plaintiff entered into an express agreement with defendants for the purchase of this property, and agreed to do certain particular things at certain times. He did not perform his contract, but deliberately ignored and violated it. He now seeks to make his own inexcusable conduct a shield against consequences which ordinarily fall upon one so negligent of his obligations, and to obtain financial reward for his deliberate violation of his contract.

THE CONDUCT OF DEFENDANTS IN ENTERING THE PROPERTY CONSTITUTED NEITHER A BREACH NOR A RESCISSION OF THE CONTRACT.

The evidence clearly and conclusively shows that defendants re-entered the property only after many serious breaches upon the part of plaintiff of his

contract, and after his abandonment of the property. They did not re-enter "wrongfully and unlawfully and without the knowledge or consent of plaintiff", as alleged in his complaint, but rather at the solicitation and request of plaintiff.

We have enumerated plaintiff's many breaches, and have shown his intentions with respect of the contract, as evidenced by his conduct and his statements, prior to the re-entry by defendants. The undisputed evidence conclusively shows that plaintiff did not endeavor or intend to fulfill his agreement, but that after having had the use and occupation of the property for one year, with forty per cent of the income therefrom to his own use and benefit, and incurring bills, which he has never paid, to meet his every requirement while in possession, he deliberately abandoned the property, after stating to several people that he did not intend to keep it.

Under these circumstances defendants were entitled to re-enter and protect their rights in the property, and their conduct in so doing constituted no rescission or breach of the contract. The notice sent to plaintiff by defendants' attorney, reads:

> "Mr. and Mrs. Chas. E. Warren have requested me to notify you *that owing to your failure to perform many of the terms and conditions on your part to be performed* in their agreement to sell and your agreement to buy * * * they have elected to terminate the agreement, and have taken possession of the property. All moneys heretofore paid on the purchase price will be treated as compensa-

tion for the rental and occupancy of the land, as provided by section 16 of the agreement."

This was clearly not a rescission. Defendants merely exercised the right given them under clause 16 of the contract to terminate all of plaintiff's rights in and to the property because of his breaches and abandonment.

Clause 16 reads:

> "*That in the event said party of the second part fails to perform any of the terms and conditions of this agreement,* or shall make default in any payment of principal or interest, *then all of the rights of the party of the second part hereto shall terminate* and *all payments theretofore made shall be retained by the said parties of the first part and treated as compensation for the rental and occupancy of the said land* up to the time of such default" (Tr. p. 17).

In perhaps the latest decision in this state upon this question, appearing in Catterlin v. Peterson, 40 Cal. App. Dec. 261 (advance sheet of February 7, 1923), the Court held:

> "The law appears to be well settled that, in the absence of an express provision in the contract of the parties to the contrary, on a default by the vendee, without legal excuse for such default, whether by waiver on the part of the vendor or otherwise, the vendor is under no obligation to give notice to the vendee of his termination of his rights under the contract. Commercial Bank v. Weldon, 148 Cal. 608; Champion Gold Mining Co. v. Champion Mines, 164 Cal. 205; Schwerin Estate Realty Co. v. Slye, 173 Cal. 172; Newhall L. & F. Co.

v. Burns, 31 Cal. App. 549.) But 'if the vendee, in fact, has been in default, a notice that the contract was terminated would have been proper, *and the vendors would be no longer bound, either to convey the land or refund the purchase money.* Such notice would have been in strict accord with the contract' (citing cases). (Lemle v. Barry, 181 Cal. 10.)

* * * * * * *

The case of Champion Gold Mining Co. v. Champion Mines, supra, also involved a principle of law similar to that in this case. There a mining property had been sold on the same plan pursued in this case, that is, on the instalment plan. The vendee had breached the contract by not making the payments agreed upon and, after some negotiations, as here, the vendor, a corporation, at a regular meeting of the board of directors thereof, adopted a resolution containing, in part, the following: 'Now, therefore, it is hereby resolved, that said agreement be, and it is hereby terminated and cancelled, and * * * be and he is hereby authorized and directed for and on behalf of this corporation, and as its act and deed, to immediately take possession of all the properties of this corporation covered by said contract'. A certified copy of the resolution referred to was delivered to the vendee. Some subsequent attempt to adjust conditions between the parties proved unsuccessful, and the vendee instituted an action to recover possession of the property and damages for the detention thereof. In holding that plaintiff (the vendee) could not recover, the court said, in part: 'We do not understand that any notice was essential to terminate plaintiff's rights under the contract. *Its default, unexcused and not waived, ipso facto terminated those rights,* and practically the only effect of the resolution was to express the determination of defend-

ant corporation not to waive such default and that the contract was, by reason of the default, terminated, and to authorize the designated officer for and in its name to retake possession'.

It is a general rule that there is no presumption in favor of an abandonment and that clear proof thereof will be required. * * * In the opinion of the court, there was no rescission or abandonment of the contract by plaintiff. He stood squarely and firmly on the terms of his written contract; he was not in default at any time with reference to anything by him to be done or performed. On the other hand, the vendees were in default; they showed no inclination to abide by the terms of their obligation to plaintiff; there was no legal excuse for their conduct because of waiver on the part of plaintiff or otherwise; *consequently they are in no position to recover any moneys paid to plaintiff on account of the purchase price.*"

Plaintiff, by his breaches, had surrendered all of his rights under the contract. His right of possession existed only under and by virtue of the contract; therefore, when his rights terminated by reason of his violation of its terms, he had no further right of possession.

The very recent case of *Los Angeles Investment Co. v. Wilson,* 39 Cal. App. Dec. 600, is decisive of of defendants' rights in the present case. The Court held:

"'The plaintiff's notice of forfeiture and demand for the restitution of the property *were not* (as was said in the opinon in *Oursler v. Thacher,* 152 Cal. 745), *a repudiation or abandonment of the contract or a consent to a rescis-*

sion thereof, any more than was the refusal of the vendor to convey in *Glock v. Howard & W. Colony Co.*, 123 Cal. 1, an abandonment or a consent to a rescission.'

In Newell v. E. B. & A. L. Stone Co., 181 Cal. 385, * * * Discussing the effect of this notice, the court said: 'The mere fact that the vendor may have been in error in supposing and declaring that unless immediate payment were made of the entire balance of the purchase price it could consider the rights of the vendee foreclosed does not convert the notice into a declaration that the vendor elected to rescind. On the contrary, defendant sought to stand upon the contract and to enforce its terms. * * * *Plaintiff was in default when the notice was received by him.* True, his prior defaults had been condoned, and he could have reinstated himself by making prompt payments of the balance due under the terms of the contract, *but he could not, by merely saying nothing, gain the right to demand repayment of the installments of the purchase price previously made. He could not place defendant in default unless he at least tendered to defendant all that was due under the agreement up to the date of his offer'.*

* * * * * * *

It is true that the notice and demand served by the plaintiff on May 11, 1920, demanding payment of the amount of instalments then due, and that such payment be made on or before the 22nd day of that month, did not directly offer to restore possession to the vendee, if such payment be made. *But the notice and demand were not necessary. The vendee being in default, the vendor might have held possession, lawfully, without any affirmative action.* (Glock v. Howard, etc. Co., 123 Cal. 1.) The notice of May 11, 1920, was a voluntary offer, not constituting a waiver of default, un-

> less accepted. If in response to that offer payment of the demanded sum had been made, the vendee then would have been entitled to be restored to possession."

In *List v. Moore,* 20 Cal. App. 620, a case very similar to the present case, where the purchaser was in default and the contract contained a provision that if he should default, all of his rights in the property would be forfeited, the vendor sent him a notice that the contract was at an end. In that case the Court held:

> "But the only fair interpretation of the notice here, *considered in connection with the terms of the contract,* is that no further affirmative action should be taken by either party to execute said contract, and that the status of each should remain as provided without further change. It is true that rescission as well as an abandonment of a contract may be shown by circumstantial or direct evidence, or both, *but the facts, fairly considered, do not compel the conclusion,* in opposition to the finding of the court, *that the owner of the land was so gratuitously generous as to voluntarily surrender the valuable right secured to her by the terms of the contract."*

The terms of the contract in question especially provided that if plaintiff should make default in *any* of the conditions of the contract, all of his rights thereunder should terminate and all payments made by him should be treated as compensation for rental and occupancy of the land.

In the case of *Hansborough v. Peck,* 72 U. S. 497, 18 L. Ed. 522, it was held that even if no such clause

had been embodied in the contract, defendants would have had the right to enter upon the premises and to retain all moneys theretofore paid by plaintiff, by reason of his default. In that case the Court said:

> "The position is, that *there is no longer a subsisting contract, as an end has been put to it by the vendor,* and he has in consequence resumed the possession, and claims to hold the estate the same as if no contract had ever existed, and that in such case the purchaser, upon settled principles of law and equity, is at liberty to recover back the consideration paid and the value of the improvements. But the difficulty is, that the vendor *has only availed himself of a provision of the contract, which entitled him to proceed* in a court of chancery, *by reason of the default of the purchaser* making his payments, to put an end to it and be restored to the possession. *It is a proceeding in affirmance, not in rescission of it, by enforcing a remedy expressly reserved in it.* Indeed, without such clause or reservation, the remedy would have been equally available to him. *It is a right growing out of the default of the purchaser,* as the law will not permit him both to withhold the purchase money and keep possession and enjoy the rents and profits of the estate; nor will it subject the vendor to the return of the purchase money if he is obliged to go into a court of equity to be restored to the possession.
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> This mode of selling real estate in the United States is a very common and favorite one, and the principles governing the contract, both in law and equity, are more fully and perfectly settled than in England or any other country. * * * And no rule in respect to the contract is better settled than this: that the party who has

advanced money, or done an act in part performance of the agreement, and *then stops short and refuses to proceed to its ultimate conclusion,* the other party being ready and willing to proceed and fulfill all his stipulations according to the contract, *will not be permitted to recover back what has thus been advanced or done.* Green v. Green, 9 Cow. 46; Ketchum v. Evertson, 13 Johns. 364; Leonard v. Morgan, 6 Gray 412; Haynes v. Hart, 42 Barb. 58."

UNDER THE CONTRACT, UPON VIOLATION OF ANY OF THE CONDITIONS THEREOF BY PLAINTIFF, DEFENDANTS HAD THE RIGHT TO RETAIN ALL PAYMENTS THERETOFORE MADE AS COMPENSATION FOR RENTAL AND OCCUPANCY OF THE PREMISES.

This contract was an entirety, and a breach by plaintiff of any one of its conditions was a breach of the whole, and discharged defendants from any further obligations thereunder. It gave them a complete right of action.

On December 8, 1920, at the time defendants took possession of the property, plaintiff was in default in the payment of interest amounting to $773.65. He was also in default in the matter of taxes, which was indeed a very important obligation upon his part which he utterly failed to perform. Under clause 10 of the contract (Tr. p. 15) plaintiff was required to pay all taxes against the property until the payment of the full purchase price. This he failed to do. Two installments of taxes became due during his possession, and he did not pay either of them. On the last day upon which taxes were pay-

able before becoming delinquent, defendants paid them in order to save the property. The taxes on this property amounted to several hundred dollars. Clause 15 of the contract provides that

> "in the event said party of the second part (plaintiff) fails to pay any of the assessments, * * * affecting said property *when due,* the parties of the first part (defendants) retain the privilege of paying the same and upon doing so, said amount or amounts so paid shall thereupon become a part of the principal and shall bear a like interest and be *immediately due and payable*" (Tr. p. 17).

Plaintiff not only failed to pay the taxes *when due,* but *he has never reimbursed defendants for the payment thereof,* which by an express provision of the contract he was required to do,—the contract providing, as we have shown, that such amounts paid by defendants for taxes, in the event of plaintiff's failure to pay them when due, should become *immediately due and payable to them.* Nor has plaintiff ever offered to reimburse defendants for these moneys, nor offered an excuse for his default. This was a gross violation of his contract.

Clause 17 of the contract (Tr. p. 17) expressly provides that "time is and shall be the essence of this contract." Plaintiff was long in default in the payment of interest and taxes. In the recent case of *Schwerin Estate Realty Co. v. Slye,* 173 Cal. 172, the Court said:

> *"Time was expressly made of the essence of the agreement* of January 18, 1913, *and failure to perform by defendants, under the terms of*

said contract, would work a forfeiture of all rights of the vendees leaving the sums previously paid in the possession of the vendor as liquidated damages. We cannot escape from the conclusion that *by failing to prove their readiness, ability, and willingness to perform their part of the contract within the time limited therein the defendants utterly failed to establish their right to any relief.* * * *

Under the terms of the contract no affirmative act on the part of the vendor was necessary to place the vendees in default. It expressly made failure to comply with its terms within the time limited 'by the parties of the second part' * * * an automatic termination of all of the vendor's obligations in law and equity. Of this agreement it may be said, just as Mr. Justice Henshaw said in *Glock v. Howard & Wilson Colony Co.,* 123 Cal. 1-16: 'In the case at bar the payment of the final amount under the contract, at the time and in the manner agreed upon was a condition precedent to the right of the vendee to demand a conveyance. Upon his failure to make payment the vendee committed a breach and no affirmative act upon the part of the vendor was necessary to bring about this result.'

* * * * * * *

If the vendees had desired to consummate the contract or to recover back their deposit they should have made a tender of the balance due and should have demanded performance by the vendor. Not having done this they are not in a position to demand the relief for which they have prayed."

And in *Glock v. Howard & Wilson Colony Co.,* 123 Cal. 14, Mr. Justice Henshaw, quoting from the

decision of Lord Loughborough in *Lloyd v. Collett,* 4 Bro. C. C. 469, said:

> "There is nothing of more importance than that the ordinary contracts between man and man, which are so necessary in their intercourse with each other, *should be certain and fixed,* and that it should certainly be known when a man is bound and when he is not. There is a difficulty to comprehend how the essentials of a contract should be different in equity and at law. It is one thing to say that time is so essential that in no case in which the day has been by any means suffered to lapse the court would relieve against it and decree performance. The conduct of the parties, inevitable accident, et cetera, might induce the court to relieve; but it is a different thing to say that the appointment of a day is to have no effect at all, and that it is not in the power of the parties to contract that if the agreement is not executed at a particular time they shall be able to rescind it. * * * I want a case to prove that where nothing has been done by the parties this court will hold in a contract of buying and selling a rule that the time is not an essential part of the contract. * * * *If a given default will not do, what length of time will do? An equity arising out of one's own neglect! It is a singular head of equity.*"

Plaintiff has never at any time, showed his willingness or ability to pay the interest due defendants, or to reimburse them for the amount of taxes paid by them; nor during his occupancy of the property did he show a willingness to comply with the other terms of the contract. On the contrary, he failed to perform nearly every condition required of him thereunder.

PLAINTIFF UTTERLY FAILED TO FULFILL THE CONDITIONS OF THE CONTRACT REQUIRED OF HIM.

This contract was made to depend upon the performance of certain conditions, and the making of certain payments, upon the part of plaintiff, and by its terms no right in the property was to vest in him until those conditons were carried out and payments made.

It is an elementary principle of law that one cannot recover under a contract until he has shown that he has performed all of the acts required of him thereunder or has offered to do so. Plaintiff voluntarily assumed the obligations called for by the contract, but before its completion he violated many of its provisions, and finally abandoned the property. He was not only in default in the payment of interest and of taxes, but also in the matter of farming the ranch properly. He deliberately violated his contract in this respect. He was required to farm the premises in a farmerlike manner—to remove dead trees, replant others, etc. He admitted that he did not replant any trees. His testimony is: "I ordered trees for replanting and cancelled the order" (Tr. p. 130). This is an important circumstance, and has, we submit, a very important bearing upon this case. It not only shows a breach by plaintiff of one of the conditions of his contract, but is proof of his intention to give up the

property and of no longer attempting to carry out his contract.

The evidence shows that in July, 1920, plaintiff placed an order with Elmer Brothers Nursery in San Jose for 300 fruit trees to be planted on this property. Subsequently, however, and in the month of October, 1920, *within a few days after moving away with his family to San Francisco, he cancelled this order.* Plaintiff has offered no excuse to the defendants nor to the court for his action in this regard; but it is significant that he did not deny the testimony of Miss Nola, the bookkeeper for the Nursery Company, who stated that at the time plaintiff cancelled the order for trees he gave as his reason therefor that *"he was going to leave town"* (Tr. p. 203). Surely no stronger proof is required to show that this was done in furtherance of his plan to abandon the property and in violation of his contract. His conduct in cancelling the order at the very time he was leaving the property, together with his statement that the reason for doing so was because he was going to leave town, taken in connection with his many defaults, his numerous debts in the vicinity of the property, and his frequent statements to many other people that he did not intend to keep the ranch and that he was going elsewhere where he could better his financial condition, is positive proof that he had absolutely no intention of ever returning or of fulfilling his contract.

PLAINTIFF HAS SUSTAINED NO DAMAGE BY REASON OF DEFENDANTS' RE-ENTRY.

Plaintiff had the exclusive possession and enjoyment of this valuable ranch and the residence and other buildings situated thereon, for a period of one year, upon the payment of but a small portion of the purchase price. He paid no rent, but received the benefits of all of the profits of the ranch; 40% directly for his own use and benefit, and 60% toward the payment of the interest and principal which he owed to defendants. Upon the strength of this contract of purchase, he borrowed money from local banks amounting to the sum of $3850, which he has never repaid; he contracted large bills for groceries amounting to several hundred dollars, and for furniture and other household necessaries, which he has never paid; he purchased farming implements and tools, upon the strength of this contract, amounting to several hundred dollars, for which he never paid, some of which were taken back because of non-payment; he bought feed for his stock amounting to $279, which he has never paid; he has never paid his workman for labor upon this property, and this debt amounts to $345.

What damage has plaintiff sustained? If he has suffered any damage at all in connection with his contract, it is purely because of his own conduct, and not because of any acts of these defendants. Defendants have committed no trespasses. It appears from his own testimony, and from that of disinterested witnesses, that he regarded this ranch

as a "white elephant," and that he was dissatisfied with it, and frequently expressed his intention of giving it up, and that he did not intend to put any more funds into it. Had plaintiff been acting in good faith, he would have made every endeavor to have complied with his contract.

> "The fact that compliance with his contract would involve greater expense than he anticipated, would not excuse defendant. Parties *sui generis* cannot escape performance of their undertakings because of unforeseen hardship" (*Metzler v. Thye,* 163 Cal. 98).

Plaintiff claimed to be a man of enormous wealth. He described himself as the owner of a vessel of immense tonnage and part owner of four others, and as having on deposit in the English and Russia Bank at Petrograd several thousand pounds sterling, and, finally, as an opium trader. Yet, while occupying this property he became financially involved, incurring debts amounting to several thousand dollars, to meet his every requirement, none of which he has ever paid. It is no wonder that he invited the defendants to occupy the place.

The situation in this case is identical with that which confronted the Supreme Court of the United States in the case of *Hansborough v. Peck,* (supra) except that in that case the purchaser attempted to act in good faith, whereas in the case at bar he has not done so. In that case Mr. Justice Nelson said:

> "The truth of the case is, that these plaintiffs improvidently entered into a purchase beyond

> their means and, doubtless, relied very much upon the rise of the value of the estate, and of the income, to meet the payments and expenditures laid out upon it. Their anticipations failed them, and a heavy debt was the consequence, beyond their ability to meet. Of the $93,000 purchase money, they have paid only $10,000. Of interest, some $28,000. They expended for improvements $18,000. There still remained due against them $83,000 purchase money and over $20,000 interest, at the time the vendor went into possession. The plaintiffs themselves had been in the possession and enjoyment of the premises for a period exceeding that for which the interest on the purchase money had been paid, which, at least, must be regarded as an equivalent for the money thus paid."

The defendants did nothing whatever to interfere with the rights of plaintiff under the contract. They re-entered after plaintiff had defaulted in many serious respects, and after he had announced his intention to cease farming the place. When they re-entered the ranch was in a condition of unpardonable neglect. It was vacant and unattended. Imperative work which should have been done by plaintiff had to be done by the defendants. Plaintiff now seeks to profit pecuniarily by his own default, and this the law does not allow.

Defendants, having in a peaceable manner assumed possession of the property when neglected and abandoned by plaintiff, have a right to retain that possession, as well as the moneys paid by plaintiff on account of the purchase price.

We have heretofore pointed out to this Court the testimony of plaintiff to the effect that when he left this ranch on October 8, 1920, he had no intention of returning to it, or of sending any one to look after it, until the first of February, 1921, and that he had no intention of ever returning to it personally, except on an occasional visit. Until February first, however, according to plaintiff's intention, this valuable property should be left entirely uncared for. Therefore, when on November 30, 1920, plaintiff's workman, Savio, left, the place was totally deserted and abandoned. It was then that defendants realized, in view of plaintiff's many other breaches, and his defaults in the payment of interest and taxes, that he had no intention of performing his obligations to them, and deemed it their right to enter and protect their property.

Plaintiff's intention with respect of the contract is clearly shown by the testimony of the various witnesses who testified that he had stated that he was not going to keep the property, and by the conversation had in the office of defendants' attorney on January 7, 1921. The subject of this conversation, according to plaintiff's testimony, was the notice sent him by defendants. During this conversation he was asked if he would take back the property, and he replied that he would not. Upon that occasion he stated to Mr. Frank King that he did not want the ranch; that he was dissatisfied with it, and he would not take it back if it were given to him (Tr. p. 206).

This occurred *just one month after defendants' re-entry,* and, according to plaintiff's own statements, *three weeks before he intended to send a workman to re-occupy the property in his behalf.*

In view of this evidence, how can plaintiff complain that he has been damaged by defendants' acts? At that time he did not claim that he had sustained any damage by reason of their re-entry. He refused to take back the property and carry out his contract, although by his own statements he had not intended to again re-occupy the property until the first of February. His present action is apparently an after-thought upon his part. Surely his conduct with respect of his contract, throughout its entire existence, does not entitle him to the relief which he now seeks. To require defendants to surrender to plaintiff, after his many breaches and defaults in reference to his contract, that sum of money which constitutes their only means of compensation for the rental and occupancy of their land, and for the interest and taxes due them, to all of which they are entitled by an express provision of the contract, would be to work the gravest injustice upon them.

We respectfully submit that the judgment should be reversed.

Dated, San Francisco,
February 14, 1923.

Respectfully submitted,
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